HJ MD RADZI ISMAIL v. MESTI UNGGUL SDN BHD

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
MAH WENG KWAI JCA
PRASAD SANDOSHAM ABRAHAM JCA
[CIVIL APPEAL NO: A-02(IM)(NCVC)-1167-07-2014]
1 MARCH 2016

LAND LAW: *Caveat – Removal – Registered owner entered private caveat on land upon discovery of fraudulent transfers – Whether caveator had caveatable interest – Whether there was serious question meriting trial – Whether caveat should be removed*

Upon discovering fraudulent transfers, the appellant entered a private caveat on a piece of land alienated to him, in his capacity as 'Pesuruhjaya Persekutuan Pengakap Malaysia'. The appellant also lodged a police report stating that Persekutuan Pengakap never signed or executed any memorandum of transfer. The respondent applied for removal of the caveat at the High Court and the application was allowed. Hence, the present appeal. The issues that arose for the court's adjudication were (i) whether the appellant had a caveatable interest; (ii) whether there was a serious question meriting a trial; and (iii) whether the caveat should be removed.

Held (allowing appeal)
Per Abdul Aziz Abdul Rahim JCA delivering the judgment of the court:

(1) As a registered owner who had lost the land through an allegedly fraudulent act, the appellant in his capacity as the Pesuruhjaya Persekutuan Pengakap Daerah Larut Matang, had a real and genuine interest to get back the land. Therefore, the appellant had a caveatable interest. (para 16)

(2) There was a serious question meriting a trial. The issue as to fraud in the transfer of land should be determined at a trial. The respondent may or may not be a party to the fraud but it must wait until the trial is over (para 17)

(3) The caveat should be allowed to remain on the register until the trial is over. The functioning of the association and scouts movement generally depends very much on public donation and possibly on grants from the Government. Therefore, any asset given to the association should be prudently managed. If any of the assets is allegedly misappropriated or lost, the association should be given opportunity to get it back. (para 18)

Bahasa Malaysia *Headnotes*

Menyedari berlakunya penipuan pindah milik, perayu memasukkan kaveat persendirian atas sebidang tanah yang diberi milik kepadanya, dalam kapasitinya sebagai 'Pesuruhjaya Persekutuan Pengakap Malaysia'. Perayu membuat laporan polis menyatakan bahawa Persekutuan Pengakap tidak

pernah menandatangani atau melaksanakan memorandum pindah milik. Responden memohon penyingkiran kaveat di Mahkamah Tinggi dan permohonan tersebut dibenarkan. Oleh itu, timbul rayuan ini. Isu-isu yang berbangkit bagi pertimbangan mahkamah adalah (i) sama ada perayu mempunyai kepentingan boleh kaveat; (ii) sama ada terdapat persoalan serius yang mewajarkan perbicaraan; dan (iii) sama ada kaveat harus disingkirkan.

Diputuskan (membenarkan rayuan)
Oleh Abdul Aziz Abdul Rahim HMR menyampaikan penghakiman mahkamah:

(1) Sebagai pemilik berdaftar yang kehilangan tanahnya akibat penipuan, perayu dalam kapasitinya sebagai Pesuruhjaya Persekutuan Pengakap Daerah Larut Matang, mempunyai kepentingan yang betul dan sah untuk mendapat semula tanah tersebut. Oleh itu, perayu mempunyai kepentingan boleh kaveat.

(2) Terdapat persoalan serius yang mewajarkan perbicaraan. Isu penipuan dalam pindah milik tanah seharusnya diputuskan dalam perbicaraan. Responden mungkin atau mungkin bukan pihak yang melakukan penipuan tetapi ia mesti tunggu hingga perbicaraan tamat.

(3) Kaveat harus dibenarkan terus berdaftar hingga perbicaraan tamat. Fungsi persatuan dan gerakan pengakap amat bergantung pada derma awam dan mungkin bantuan Kerajaan. Oleh itu, apa-apa aset yang diberi kepada persatuan mesti diuruskan dengan cermat. Jika ada apa-apa aset yang didakwa disalah guna atau hilang, persatuan mesti diberi peluang mendapatkannya semula.

Case(s) referred to:
Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***
Kho Chong Hee v. Kho Thong Hock & 2 Ors [2004] 1 LNS 655 HC ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***
Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(refd)***
Mohamed Ali Abdul Razak v. Sim Hock Yong [2007] 6 CLJ 337 CA ***(refd)***
QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***
Tan Sri Hj Othman Saat v. Mohamed Ismail [1982] 1 LNS 2 FC ***(refd)***
Upmarket Development Sdn Bhd v. Sriera Development Sdn Bhd [2011] 6 CLJ 137 FC ***(refd)***

Legislation referred to:
Scouts Association of Malaysia (Incorporation) Act 1968, ss. 2, 3(3), 7(1), (2)

For the appellant - Joshua Ding; M/s Joshua Ding & Partners
For the respondent - N Subramaniyan; M/s Subramaniyan

[Editor's note: For the High Court judgment, please see Mesti Unggul Sdn Bhd v. Hj Md Radzi Ismail [2015] 10 CLJ 465 (overruled).]

Reported by Najib Tamby

JUDGMENT

Abdul Aziz Abdul Rahim JCA:

[1] This is the appellant's (defendant in the High Court) appeal against the decision of the learned Judicial Commissioner given on 26 June 2014 at Ipoh allowing the respondent's (plaintiff in the High Court) application to remove the caveat entered by the appellant on a piece of land described as GM 250 Lot 3365 Mukim Tupai, District of Larut & Matang, Perak ("the said land"). The reason for the removal of the caveat was because the appellant has no caveatable interest.

[2] The said land was alienated to Pesuruhjaya Persekutuan Pengakap Malaysia Daerah Larut Matang & Selama, Perak on 15 March 1972. The said land measured approximately nine acres. At all material times the appellant was the Pesuruhjaya Persekutuan Pengakap Malaysia Daerah Larut Matang & Selama ("the Scouts Commissioner"). On 1 October 2013, the appellant conducted a search at the Larut & Matang Land Office and discovered that the said land has been transferred three times within 22 days purportedly without his knowledge as the Scouts Commissioner or consent *vide* three memorandum of transfer ("MOT"). The first MOT was dated 16 July 2013 between the Scouts Commissioner and a company called Ikatan Asas Sdn Bhd for the consideration of RM300,000. The second MOT was dated 23 July 2013 between Ikatan Asas Sdn Bhd and ABI Teamworks Sdn Bhd for the consideration of RM320,000. The third MOT was dated 31 July 2013 between ABI Teamworks Sdn Bhd and the respondent for the consideration of RM380,000.

[3] Upon discovery of the purportedly fraudulent transfers, the appellant on the same day entered a private caveat on the said land in his capacity as 'Pesuruhjaya Persekutuan Pengakap Malaysia'. The ground for the entry of the caveat, as stated in Borang 19B (statutory form under NLC) for application to enter a private caveat, is:

> Untuk mencegah dari pindah milik seterus setelah berlaku penipuan jual beli.

[4] The application for the entry of the caveat was accompanied by a statutory declaration made by the appellant in his capacity as the Scouts Commissioner for Larut & Matang. In the statutory declaration, the appellant gave the same reason for the caveat.

[5] On 3 October 2013, the appellant also lodged a police report at Balai Polis Taiping (Report No. TAIPING/007842/13). In his police report the appellant said that Persekutuan Pengakap had never signed or executed any MOT to transfer the said land to the abovementioned transferees. He also said that the company Ikatan Asas Sdn Bhd had been wound up and a liquidator had been appointed on 1 March 1999. Further, the appellant stated in his police report that the purported transfers were fraudulent because the

original title to the land (Borang 5DK) is still in his possession and the land was still in the name of Pesuruhjaya Persekutuan Pengakap Malaysia, Daerah Larut Matang & Selama. However it is interesting to note in the same police report the appellant had disclosed the fact that on 29 December 2011, through a sale and purchase agreement, Persekutuan Pengakap had sold the said land to one Ong Kah Huat (the purchaser) and one of the conditions of the sale is that the Persekutuan Pengakap as the vendor to ensure that the express condition of land use of the said which is Pendidikan & Latihan Pusat Latihan be cancelled.

[6] Before we discuss the issue whether the appellant has caveatable interest or otherwise, we will say something about the transferees ABI Teamworks Sdn Bhd and the respondent. The information that we are about to comment on is found in the company search conducted with SSM by the appellant in respect of the two transferees company. The company search on ABI Teamworks (ABI) was conducted on 13 March 2014. ABI has an authorised capital of RM1 million and the total issued ordinary shares is also one million. It has two directors, Shakiman Md Isa and Hamzah Abdul Samad holding 600,000 and 400,000 ordinary shares respectively. It also has one secretary, Nor Shahidan Abu Bakar. The nature of business of the company is listed as rubber trading and general constructions. The respondent is a company with paid up and issued capital of RM100,000 divided into 100,000 ordinary shares. They are two directors – Mohd Jefri bin Pawan Teh and hold 70,000 shares and Shafie bin Othman who holds the remaining 30,000 shares. It shares a common secretary with ABI Teamworks Sdn Bhd. The search list with SSM dated 13 March 2014 reveal no business address of the company and the nature of the business was described as 'dormant'. However it has current assets value at RM87,173.

[7] In deciding the respondent's application to remove the caveat entered by the appellant in his capacity as the Scouts Commissioner for Larut Matang and Selama division, the learned trial judge had correctly reminded himself of the three tiers test set out in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719 – the *locus classicus* on the principles of removing a private caveat.

[8] However in this case the respondent also raised the issue of *locus standi* of the appellant to lodge the caveat. Learned counsel for the respondent argued that the Scouts Association of Malaysia is a legal person in its own right. The association was incorporated through the Scouts of Malaysia (Incorporation) Act 1968. Section 2 of the Act clearly states that the corporation means the Persekutuan Pengakap-Pengakap Malaysia. Section 3(3) of the Act 409 provides that the corporation may sue and be sued in all courts and in all manner of actions and suits and may do all other matters and things incidental of appertaining to a body corporate. Thus, it was submitted that no one else has the *locus* to appear before the courts on behalf of the Boy Scouts Association of Malaysia in this country. Moreover, learned

counsel for the respondent submitted that the appellant had used multiple designations - Pesuruhjaya Persekutuan Pengakap Malaysia, Pesuruhjaya Pengakap Daerah Larut Matang & Selama and Pesuruhjaya Pengakap Malaysia Daerah Larut Matang & Selama – to describe himself. Learned counsel further submitted that none of these designations are found in the Scouts Association of Malaysia (Incorporation) Act 1968 (Act 409). Learned counsel also referred to s. 7 of the Act 409. Section 7(1) provides that "the corporation shall have a common seal." Section 7(2) provides that all deeds, documents and other instruments requiring the seal of the corporation shall be sealed with the seal of the corporation, pursuant to a resolution of the council to the effect, in the presence of the persons for the time being discharging the duties of the National Chief Commissioner or an Assistant National Chief Commissioner and one other person whom counsel has authorised to sign the deed, document or instrument to which the corporation seal is affixed.

[9] In our view the above submission on the issue of *locus standi* which found favour with the learned Judicial Commissioner is narrow and does not reflect the current state of the law. In our view also the law on *locus standi* in this country has developed by leaps and bounds since the then Supreme Court decision in *Tan Sri Hj Othman Saat v. Mohamed bin Ismail* [1982] 1 LNS 2; [1982] 2 MLJ 177. In that case the court approved and endorsed the 'concept of liberalising the scope of individual standing'. Nonetheless, in later cases our courts still grapple with the question of which is the proper test to determine *locus standi.* From the cases such as *Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12, *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532 and *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507, the usual test to be applied is the 'adversely affected' test and the 'legal right' test. However one has to be careful with generalisation. Most of the cases where the debate regarding which is the proper test to be applied is in issue, are injunction or judicial review cases involving public interest litigation. Therefore in deciding whether the proper test was applied in determining *locus standi* of a litigant, the court must look at the whole factual matrix of each case. That notwithstanding, in the recent Federal Court case of *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 2 CLJ 525; [2014] 1 MLJU 92, it was said that a litigant may have *locus standi* if it can be shown that the litigant has 'a real and genuine interest' in the matter under consideration. Applying this latest test, we are of the view that the appellant in this case has the *locus* to enter the caveat. In any event we are also of the view that the issue of *locus standi* in this case is irrelevant.

[10] The real issue is whether the caveator (in this case the appellant) has a caveatable interest. This is the first stage that must be determined under *Luggage Distributors (M) Sdn Bhd* (*supra*) principles. In this regard we observe

A that the appellant has entered the caveat in his capacity as the Pesuruhjaya Persekutuan Pengakap Malaysia in Form 19B. We also note that before the purported fraudulent transfer of the said land to the respondent, the land was registered under the name of Pesuruhjaya Persekutuan Pengakap Malaysia Daerah Larut Matang & Selama as the registered owner and not the Scouts B Association of Malaysia.

[11] Learned counsel for the respondent submitted that in the appellant's memorandum of appeal the appellant had raised the issue that he was the registered owner of the said land. Citing the case of *Mohamed Ali Abdul Razak v. Sim Hock Yong* [2007] 6 CLJ 337, it was submitted that as a registered C proprietor, the appellant does not have a caveatable interest on the said land because the land already belonged to him. We think there is a technical flaw in this argument. It will be noticed that the respondent had sued the appellant as Pesuruhjaya Persekutuan Pengakap Malaysia Daerah Larut dan Matang, Perak. The appellant's designation as such was also acknowledged by the D respondent in the endorsement to its originating summons under the heading "Alasan-alasan permohonan ini.." (See respondent's saman pemula at pp. 17-19 rekod rayuan). Paragraph 1 of the endorsement the respondent had written as follows:

> 1. Defenden selaku Pesuruhjaya Persekutuan Pengakap Malaysia E Daerah Larut dan Matang telah pun mengisi dan menandatangani Borang 14A untuk memindah tanah yang dipegang di bawah GM260, Lot 3365 Mukim Tupai Daerah Larut Matang kepada syarikat Ikatan Asas Sdn Bhd pada 16 Julai 2013 berasaskan perjanjian jual beli bertarikh 18 Jun 2001.

F **[12]** When the appellant entered the caveat (in his capacity as the Scouts Commissioner) the said land had already been transferred to ABI Teamworks Sdn Bhd by Ikatan Asas Sdn Bhd and then by ABI Teamworks to the respondent. (See Borang 14A (MOT) at pp. 62-72 rekod rayuan). Technically therefore when the appellant entered the caveat the said land was no longer belonged to Pesuruhjaya Persekutuan Pengakap Larut Matang.
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[13] In Form 19B, the appellant has stated the reason for the caveat as follows:

> untuk mengelak dari pindah milik seterus setelah berlaku penipuan jual beli.

H **[14]** I have the occasion in the case of *Kho Chong Hee v. Kho Thong Hock & 2 Ors* [2004] 1 LNS 655; [2004] MLJU 688 (cited by learned counsel for the respondent) to say, in deciding whether the interest is a caveatable interest, the court will look only at what is stated in the caveat and the supporting documents that accompanied its entry. I still hold to that view.
I

[15] However in this case the indisputable fact is that the said land was originally registered in the name of Pesuruhjaya Persekutuan Pengakap Malaysia Daerah Larut Matang and the appellant at the material times was holding that position. The appellant had averred in his afidavit balasan defendant affirmed on 28 February 2014 as follows:

5. Para 4 dan 5 Afidavit tersebut saya pertikai dengan tegas kerana pendaftaran Plaintif sebagai pemilik berdaftar adalah melalui proses penipuan (fraud) dan/atau pemalsuan (forgery) dan/atau misrepresentasi dan/atau melalui surat cara yang batal atau tidak memadai atas fakta saya selaku Pesuruhjaya Pengakap Daerah Larut & Matang tiada memindah milik tanah milik Pengakap tersebut kepada mana-mana pihak.

6. Para 4 Afidavit tersebut menyatakan bahawa Plaintif ialah pemilik berdaftar hanya berdasarkan suatu carian yang saya nafi dan pertikai dan mencabar Plaintif untuk mengemukakan suratan milik asal tanah tersebut.

7. Saya menegaskan surat hak milik asal tanah tersebut sentiasa dan masih dalam simpanan saya.

8. Pada 01/10/2013, saya dan ahli-ahli jawatankuasa Persekutuan Pengakap telah pergi ke Pejabat Tanah Daerah Larut Matang untuk menyemak status suatu permohonan bagi tanah tersebut dan amat terperanjat diberitahu oleh pegawai pejabat tanah bahawa kami bukan lagi pemilik berdaftar kerana pada 6/8/2013 Plaintif telah didaftarkan sebagai pemilik tanah tersebut.

9. Justeru itu, saya membuat carian yang menunjukkan beberapa urus niaga penipuan dan/atau pemalsuan dan/atau misrepresentasi dan/atau melalui surat cara yang batal atau tidak memadai tanah tersebut.

10. Mengikut Borang 14A KTN bertarikh 16/07/2013, kononnya saya menjual tanah tersebut kepada sebuah syarikat iaitu Ikatan Asas Sdn Bhd (No. Syarikat 283428-V) beralamat No. 101, Jalan Station, 34000 Taiping, Perak dengan balasan RM300,000.00.

11. Saya bersumpah bahawa tandatangan di atas nama saya serta cap 'Pesuruhjaya Pengakap Daerah Larut Matang & Selama' sebagaimana yang ada pada Borang 14A KTN bertarikh 16/07/2013 tersebut adalah palsu.

12. Saya juga bersumpah bahawa saya tidak pernah setuju dengan balasan RM300,000.00 yang dinyatakan dan tidak menerimanya.

13. Selanjutnya, mengikut Borang 14A KTN bertarikh 23/07/2013, iaitu seminggu kemudian, syarikat 'Ikatan Asas Sdn Bhd' (No. Syarikat 283428-V) telah menjual tanah tersebut kepada syarikat A.B.I. Teamworks Sdn Bhd (No. Syarikat 539501-W) pula.

14. Mengikut Borang 14A KTN bertarikh 31/07/2013, iaitu lebih kurang seminggu kemudian, syarikat A.B.I. Teamworks Sdn Bhd (No. Syarikat 539501-W) pula menjual tanah tersebut kepada Plaintif.

15. Berdasarkan fakta-fakta carian tersebut, pada hari sama iaitu 01/10/2013, saya telah memasukkan Kaveat Persendirian sebagaimana ditanda ekshibit MJ-2, Afidavit tersebut dan menegaskan bahawa isi kandungan Borang 19B KTN dan surat akuan saya adalah benar dan saya menafikan Plaintif ialah pembeli sah.

16. Bagi pihak Persekutuan Pengakap yang menuntut hak milik tanah tersebut, saya berhak memasukkan Kaveat tersebut.

17. Saya juga membuat Laporan Polis tentang penipuan dan pemalsuan pindah milik-pindah milik tersebut.

[16] In our view the ground for the entry of the caveat as stated in Form 19B and supported by the statutory declaration must be considered in the light of the factual matrix as averred by the appellant in his afidavit balasan defendan above. The appellant has raised the issue of fraud being perpetrated in Form 19B in the transfer of the said land to the respondent. As a registered owner who had lost the said land through allegedly fraudulent act, the appellant in his capacity as the Pesuruhjaya Persekutuan Pengakap Daerah Larut Matang, in our view has a real and genuine interest to get back the said land. Therefore in our view the appellant has satisfied first stage test under the *Luggage Distributors* (*supra*) principles in that it has a caveatable interest. In taking this liberal approach to the issue we are guided by what was said by the Federal Court in *Upmarket Development Sdn Bhd v. Sriera Development Sdn Bhd* [2011] 6 CLJ 137; [2012] 1 MLRA 124, speaking through Abdul Hamid Embong FCJ:

> We are of the view that a liberal and more progressive approach should be taken in the interpretation of caveat forms. The various statutory provisions under the NLC and the RHC which we earlier referred to, support this liberal interpretive approach. We may add that even a common sense approach would bring the same conclusion. The accompanying statutory declaration may also be looked at in determining the form's actual purport. The form should not therefore be viewed in isolation. The court should place more weight to the substance rather than form.

Another direct point of relevance to the case at hand, are the following words of Abdul Hamid Embong FCJ:

> Next, we remind ourselves that a caveat is neither final nor conclusive. It is in essence a temporary equitable remedy, just like an interim injunction, provided to maintain the *status quo* of the parties. As such, the balance of convenience factor should be considered and determined upon any application for its removal. The courts below have failed to give any consideration to the balance of convenience (balance of justice) test in removing the appellant's caveat, as formulated in *Murugappa Chettiar Lakshmanan cv. Lee Teck Mock* [1995] 1 MLRA 206. We hold that this failure amounts to a serious misdirection on the part of both courts below.

[17] The next issue is whether there is a serious question meriting a trial. On the facts averred by both the appellant and the respondent in their respective affidavits in this case we have no hesitation to conclude that there is. The respondent in its affidavit supporting the application in the originating summons for the removal of the caveat affirmed on 27 January 2914 by Mohd Jeffri bin Pawan Teh (one of the respondent's directors) had averred that the respondent is the registered owner and a *bona fide* purchaser. Whereas the appellant in afidavit balasan defendan had denied executed Borang 14A in favour of Ikatan Asas Sdn Bhd and that his signature and the stamp of Pesuruhjaya Persekutuan Pengakap Daerah Larut Matang & Selama on the purported Borang 14A were forged. Incidentally also, on 20 October 2014 a different panel of this court had allowed the appellant's application to admit two fresh evidence. The first evidence is a letter dated 9 June 2014 from Jabatan Siasatan Jenayah Commercial IPD Taiping to Pegawai Pentadbir Tanah Daerah Larut Matang Dan Selama requesting that the Registrar's caveat on the said land which was entered by the Registrar of Titles on 23 October 2013 be extended because the investigation into the alleged fraud was still ongoing. (See pp. 4-5 Rekod Rayuan Tambahan 2). The second evidence is a letter from Lembaga Hasil Dalam Negeri Malaysia (LHDN) to the appellant's solicitors dated 20 June 2014 confirming that the LHDN stamp certificate on all three MOTs has never been issued by any Stamp Office of LHDN. In the light of the above evidence we say that the issue as to fraud in the transfer of the said land should be determined at a trial. The respondent may or may not be a party to the fraud. But the respondent must wait until the trial is over.

[18] The final question to be answered is where should the balance of justice lie in this case? Should the caveat be removed or should it be allowed to remain on the register until the trial is over. In our view the latter option should prevail. The Scouts Association is a uniform body which inculcates good values such as honesty, integrity and social responsibility especially among the younger people who become its members. The functioning of the association and scouts movement generally depends very much on public donation and probably also on grants from the Government. Thus, any asset that was given to the association to finance its scouting activities should be prudently managed. Therefore, if any of the assets belonging to the association is allegedly be misappropriated or otherwise lost the association should be given the opportunity to get it back. In the instant case the said land measured approximately nine acres. With that kind of land's size, there are many things that the association can do to benefit the scouts movement in Larut Matang and Selama.

[19] For the above reasons, we allow this appeal. We order that the caveat be reinstated and the High Court order be set aside. We also award cost of RM10,000 to the appellant and the deposit is refunded.